



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

June 19, 2020

BY ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1020
New York, NY 10007

Re: Lambda Legal Defense and Education Fund, Inc. v. U.S. Dep't of Health and Human Services, No. 19 Civ. 4707 (PKC)

Dear Judge Castel:

This Office represents Defendant United States Department of Health and Human Services (“HHS”) in the above-referenced case brought by Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Plaintiff”), pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. We write on behalf of both parties to provide the Court with a status update, pursuant to the Court’s September 23, 2019 Order (Dkt. No. 21). Previous joint status reports were filed with this Court on December 19, 2019 (Dkt. No. 22) and March 20, 2020 (Dkt. No. 23).

Since the March 20, 2020 status report, HHS has continued to process and produce documents according to the procedure in the parties’ joint letter of September 16, 2019 (Dkt. No. 19), as directed by the Court’s September 23, 2019 Order. HHS also agreed to increase its processing pace from 500 pages per month, to 700 pages per month. Since the March 20, 2020 status report, HHS has processed a total of 4,295 pages of potentially responsive material and made four productions, in which a total of 441 pages were released in full or with redactions. The remaining pages were withheld as exempt from FOIA (2,138 pages), sent to another agency for consultation (42 pages), or determined to be nonresponsive (1,674 pages). Together with HHS’s previous productions, HHS has now reviewed a total of 7,987 pages of potentially responsive material, and it has produced 3,445 pages, either in whole or in part, to Lambda Legal.

The parties have continued to discuss potential ways to refine the searches associated with Lambda Legal’s FOIA requests, as the volume of potentially responsive documents based upon previously-agreed search parameters is close to 100,000 pages.¹ In February 2020, the parties

¹ Three FOIA requests are at issue in this litigation. The FOIA requests seek information about HHS’s activities regarding lesbian, gay, bisexual, transgender, and queer matters or people, and specifically pertain to HHS’s policies and decisions (“the Nondiscrimination Policies/935 Request”), the activities of politically appointed officials at HHS (“the HHS Officials/937 Request”), and coordination between HHS and outside organizations (“the Outside

agreed to deprioritize processing of the Outside Organizations/936 Request and shift to processing the HHS Officials/937 Request. At HHS's suggestion as a means to narrow the high volume of potentially responsive documents, Lambda Legal also agreed that HHS may exclude external listserv emails while processing the HHS Officials/937 Request, to enable HHS to process Lambda Legal's requests more quickly.

Given the anticipated completion of the review based on the volume of the requests and the current rate of processing, Lambda Legal has requested that HHS propose a date certain to finish production of the HHS Officials/937 Request instead of the current processing schedule. In response, HHS agreed to increase the processing rate to 700 pages per month, and has suggested further potential avenues to narrow Lambda Legal's request.² Lambda Legal has agreed to narrow the scope of political appointees covered by the 937 Request from all HHS political appointees to those in particular offices and a list of specific HHS appointees. However, despite the increased processing speed in the past three months, Lambda Legal remains concerned that the processing rate is not sufficient to complete the 937 Request in a reasonable amount of time.

Although HHS understands Lambda Legal's desire to obtain responsive documents quickly, Lambda Legal's two outstanding requests involve tens of thousands of pages of potentially responsive documents.³ Due to the breadth of Lambda Legal's requests, HHS has been attempting to negotiate refined search parameters since the outset of this litigation, while also agreeing to increase its processing rate by 40%. HHS is encouraged that Lambda Legal has now agreed to certain narrowing parameters, and HHS hopes that the parties can continue to discuss other narrowing proposals.

HHS also notes that the ever-changing and unprecedented public health crisis caused by COVID-19 will also affect HHS's ability to increase processing speed. HHS is understandably prioritizing public health issues. Moreover, the relevant HHS FOIA personnel as well as the assigned AUSAs in the USAO SDNY are on telework until further notice, which has resulted in significant off-site network usage and delays. Thus, although HHS has committed to process 700 pages per month and to continue negotiations over refinement proposals, the burdens imposed by the global pandemic may result in unavoidable delays.

Organizations/936 Request"). As set forth in the parties' September 16, 2019 joint letter and December 19, 2019 status report, HHS has run initial searches and located potentially responsive material for the Outside Organizations/936 Request and the HHS Officials/937 Request. The parties agreed to defer processing the Nondiscrimination Policies/935 Request to focus on the other two requests.

² HHS previously estimated that there are 83,000 pages responsive to the HHS Officials/937 Request, and is working to determine the number of pages after removal of the external listserv emails. It anticipates that the volume will still be significant, even after removing such documents.

³ One basis for the parties' agreement to defer processing the Nondiscrimination Policies/935 Request is because the volume is anticipated to be significantly greater than that of the other two requests because of the facial breadth of the Nondiscrimination Policies/935 Request.

Page 3

Lambda Legal has recently raised concerns about HHS's withholding of certain of the materials processed since the last status report, primarily under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), which exempts documents that would be privileged in civil litigation, including pre-decisional or deliberative material. Based on the unredacted information that has been provided, Lambda Legal is concerned that HHS may be overbroad in its assertions of Exemption 5. The parties have begun discussing the redactions and whether HHS can provide further information that would better enable Lambda Legal to understand the nature of the withheld documents, and the parties will continue to discuss the path forward. Should the parties not reach an agreement, Lambda Legal may request the aid of the Court ahead of the next status report.

At this time, the parties will continue negotiations with the goal of reaching a mutually agreeable processing and production schedule, including discussing potential refinements to the scope of the HHS Officials/937 Request. Should the parties not reach an agreement within thirty days, Lambda Legal intends to request that the Court hold a hearing to set a date certain by which production of the 937 Request is to be completed.

We thank the Court for its consideration.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: /s/ Danielle J. Levine
DANIELLE J. LEVINE
ANTHONY J. SUN
Assistant United States Attorneys
86 Chambers St., 3rd Floor
New York, New York 10007
(212) 637-2689 / 2810

cc: All counsel of record (via ECF)